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Senate

The Senate met at 9:45 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Sovereign shepherd, who guides and protects us, hallowed be Your name. We praise You for Your love and wisdom. Lord, You are compassionate and gracious, full of loving kindness, ready to forgive, and generous beyond imagining. We find refuge in the shadow of Your wings.

Thank You for the gift of Yourself and for teaching us how to live and serve. Forgive us when we fail to live in complete dependence upon You so that Your power can work through us.

Strengthen our Senators today in every good work and every good word so that they may honor You in their labors. Give them joy in doing Your will. Help them to be attentive to Your voice and sensitive to Your movements.

Transform each of us into Your instruments, enabling us to help bring peace to our world.

We pray this in Your holy Name. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. FRIST. Mr. President, today the Senate will be in a period of morning

business for 60 minutes. The first 30 minutes will be under the control of the Democratic leader or his designee, and the final 30 minutes will be controlled by this side of the aisle. That hour of morning business will begin after leader time is used.

Prior to the Easter break, I mentioned our intention to begin consideration of the asbestos legislation. I understand there will be objection from the other side of the aisle and, therefore, I will move to proceed to the asbestos measure.

I do ask Members to come to the floor today to debate this motion. If we are unable to begin consideration of the bill, it may be necessary to file cloture on the motion to proceed. Discussions will be underway over the course of this morning across the aisle and among various interested Senators as to specific plans.

UNANIMOUS CONSENT REQUEST— S. 2290

Mr. FRIST. Mr. President, I ask unanimous consent that immediately following the morning business period today, the Senate begin consideration of Calendar No. 472, S. 2290, the asbestos bill.

Mr. DASCHLE. I object.

The PRESIDENT pro tempore. Objection is heard.

FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2004—MO- TION TO PROCEED

Mr. FRIST. Mr. President, I now move to proceed to the consideration of S. 2290, and I ask unanimous consent that the motion be set aside until the conclusion of the use of leader time and the 1 hour period of morning business.

The PRESIDENT pro tempore. Without objection, it is so ordered.

RECOGNITION OF THE ASSISTANT DEMOCRATIC LEADER

The PRESIDENT pro tempore. The deputy leader is recognized.

ORDER OF PROCEDURE

Mr. REID. Mr. President, very briefly, under our controlled one-half hour, we yield 15 minutes to Senator HARKIN, 7½ minutes to Senator CORZINE, and 7½ minutes to Senator SARBANES.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. FRIST. Mr. President, I am going to make a 10-minute statement. I would be happy to turn to the Democratic leader for any opening comments.

Mr. DASCHLE. I have a statement as well. It would require about the same length of time. I will defer to the majority leader and make my comments after he has completed his.

ASBESTOS LITIGATION REFORM

Mr. FRIST. Mr. President, for Senators who are going to be here for morning business, it will probably be another 20 minutes or so, total time between the two leaders' time, before morning business begins.

As I said in my opening comments, our intention is to go to asbestos and to bring to closure a very important piece of legislation that a lot of people across the aisle have worked on and are dedicated to addressing.

I believe now is the time to do that. I want to briefly introduce my view of the current status of the asbestos litigation debate and how I think we can bring that debate to closure.

This body—both sides of the aisle—has recognized that asbestos litigation has run amok. It is time to fix what has become an embarrassing, inadequate system that we have, the purpose of which is to compensate victims. The current system is broken. It fails to compensate victims fairly, while at

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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the same time imposes huge costs on our economy and thus on jobs and job creation.

We now have a choice, and it is a choice I very much think we should face right now, and that is to either leave the sick asbestos victims to suffer the vagaries of this system as it works today or put our very best work together to give them a better and more reliable and more secure system. There will be a lot of comments made over the course of the day and the week, but I think it is important to understand that we have made substantial progress, meaningful progress toward creating a better system. With all of this progress, it is now time to bring it to a focal point and bring it to closure.

The chairman of the Judiciary Committee, Chairman HATCH, has brought S. 1125, the FAIR Act, the Fairness in Asbestos Injury Resolution Act, from its introduction through that Judiciary Committee, and a number of parties have participated in the various negotiations to get it to the floor.

Now is the time to take very deliberate action—it is going to be difficult over the next several days to do that—and to finish the process and bring relief to victims and stop the devastating impact the current system is having on our economy. Although we have made real breakthroughs and we have moved forward through a lot of continued discussions among the various stakeholders and various Senators, a lot of which has occurred since Senator HATCH's work with the committee, there are still a lot of calls to delay and put things off until some indefinite time in the future. Since I have been involved, pretty much after it came out of committee, there have been calls for delay—we need another week or 4 days or month or 2 months or 3 months. Now we need to stop talking about it and actually do it. We need to fix the system, which we know—I think there is a general consensus—is broken; that it is unfair and it hurts the economy. It is a detriment to our economy.

I have made it a leadership priority for the Senate to help resolve this issue. We have given parties, again and again, additional time to work out some of the issues. But now we need to take decisive action. As I said, there is wide agreement. If you look at the problem itself—that the current system is a disaster for victims and for jobs and a disaster for the impact on the economy—we are pouring vast amounts of money into this defunct system. But as we pour money into it, the system is getting worse and worse. More than 700,000 individuals have filed claims and, right now, there are 300,000 claims out there pending—300,000 claims. We have spent \$70 billion trying to resolve these claims.

You must ask, with 300,000 claims out there and having spent \$70 billion, what do we have to show for it today? Well, we have a system where sick vic-

tims of asbestos exposure have to wait in line with thousands of unimpaired claimants. We have the sick and people who have not been hurt at all, and they are all waiting. Sick victims wait too long for an award. The ones we need to focus on, the ones who are sick, now have to wait a long time. It is almost like a lottery system where few claimants—there are a few who get very large awards, but many get little, often based on simply where, for example, the claim was filed. The big winners are always the trial lawyers who have taken billions of dollars out of the system, which is money that should be going to the sick victims.

As much as half of every dollar spent in the system goes to the trial lawyers and to other expenses. If we say there is \$70 billion, we say half is not going to the victims, the people being hurt, not to the potential victims. Obviously, it is clear that system needs to be fixed. It is inequitable, a wasteful system, and nothing is being done to make it better. In fact, you can see it is getting worse.

Future funds that should be preserved to compensate sick victims are simply being drained away by frivolous claims today. I keep hearing more and more of the large number of unimpaired claims that are filed based on questionable, so-called "diagnoses" that are obtained through these mass screenings. That process simply has to come to an end.

As business after business has gone bankrupt paying these claims, sources of revenue to pay the claims are drying up. Already more than 70 companies have filed for bankruptcy after being flooded by asbestos claims. The companies that actually manufacture asbestos products have long been bankrupt. Today we have the lawyers zeroing in on new companies in order to keep funding their suits. Many of these companies have little to do with asbestos. Right now, 8,400 companies have been named in asbestos suits. That includes mom-and-pop companies all the way to Fortune 500 firms. That is 8,400 companies that have been named right now in asbestos suits.

When companies collapse under this asbestos suit pressure, not only do resources for the sick victims dry up, for the people who have been affected physically by asbestos, but now there is a whole new class of victims that has been created. This new class of workers at these companies lose their jobs and lose not only current payments but also their retirement savings. Bankruptcies have affected 200,000 people who worked at bankrupt companies. Sixty thousand people lost their jobs, and these people will lose an estimated \$50,000 in wages each because of the disruption. Workers also see retirement savings plummet when a company files for bankruptcy.

In the end, the American economy suffers. That, of course, means the loss of new jobs and investment, as well as the loss of companies that are literally

pulled under by these asbestos claims. If the current situation holds, it will cost as many as 400,000 new jobs that could be created in this time of economic recovery but will not be because of the failure to invest. So we have watched this deterioration and we have talked about it for all too long. Now we must act.

So as we move forward, we need to move forward understanding there is bipartisan general agreement that the litigation challenge before us, which has run amok, must be cleaned up. Rationality and justice must be restored and we must get the compensation to those who need it. We must do it through a system that preserves jobs, preserves economic growth for current workers, and stewards funds for future claimants.

Indeed, this body has been struggling with these issues for some time, and it has met with success despite the difficulty of reaching agreement in some very specific contentious areas. Chairman HATCH did yeoman's work in July getting S. 1125 through the committee. There were a whole range of successes worked out by the committee. Chairman HATCH led a major bipartisan solution on a linchpin issue of medical criteria; and without agreement on this issue, we simply would not have been able to move forward at all. This issue, over time, has proven very difficult, very controversial. I commend him for his leadership in bringing the resolution to this particular issue. That is just one of the many examples of issues that have been overcome.

Chairman HATCH noted that as many as 50 changes were made at the urging of Democrats before—really between the bill's introduction and the time of markup—and there have been many ongoing discussions in the wake of that success.

I also thank Members on the other side of the aisle. Senator LEAHY has worked hard on this bill, and it simply would not have been possible to get as far as we have—even though we have a long way to go—without his work on the other side of the aisle, as well as the various stakeholders who have an interest in this bill.

The commitment of many parties has created the momentum for change, for cleaning up the system, and the good faith that has led to a number of key breakthroughs that have been seen today and that I am confident will continue to make success possible.

Following the committee markup, I became deeply involved in negotiations on S. 1125, working closely with Senator DASCHLE, as well as Chairman HATCH and Senators LEAHY, DODD and CARPER, and others on both sides of the aisle.

My colleague from Pennsylvania, Senator SPECTER, has been particularly instrumental working on key elements of the bill, so I wish to recognize him for that.

Under S. 1125 and current agreements which are embodied in S. 2290, we will

replace the current adversarial asbestos litigation system with a new streamlined no-fault system where sick victims will be compensated fairly and efficiently. A national trust fund will pay claimants, cutting out waste and providing certainty and rationality for claimants and for businesses. Most importantly, this system will end the bankruptcy spiral, therefore preserving future funding for victims who need it.

S. 1125, as reported out of committee, represents an unprecedented achievement in forging consensus on issues like medical criteria that stalled previous attempts at similar legislation. Nonetheless, a number of issues were left open for further discussion, and additional concerns were raised that were not addressed by the committee. I identified these issues on the floor on November 22, 2003, and they include adequacy and security of funding, claims values, administration of the system, and protection of claimants from the risk of a funding shortfall.

Since the bill was reported out of committee, various stakeholders and members from both parties have continued negotiations. There have been more than 20 meetings starting last July at which my staff and Senator SPECTER's staff have negotiated these issues with staff representing the minority. What has emerged from all these collective efforts is a proposal that retains the key elements of S. 1125, and includes some critical modifications that address concerns that were raised by stakeholders. Today's proposal embodies the best thinking on these issues and represents an aggressive yet feasible solution to the crisis.

These negotiated agreements make it possible to bring a bill to the floor, and the bill is better for these changes, difficult as they were to hammer out.

First, we had to make sure the system contained claims values that would fairly and adequately compensate victims. Second, we had to make sure funding was adequate—and that any risk of shortfalls rests on defendants and insurers, and not on claimants. The bill also provides the administrator with more flexibility to ensure that any short term bulges in claims can be accommodated. Third, we had to make sure the new system would be easy for claimants to use, and that it could be funded and up and running quickly. Fourth, the bill now contains a number of additional provisions requested by organized labor to protect the rights of claimants. I am also submitting an expanded description of these changes for the RECORD.

The top priority of this bill is to compensate claimants, and under any analysis, more money reaches claimants under the bill than under today's flawed tort system. Even so, we know that we needed to reach a number that Democrats felt comfortable with, so S. 2290 raises claims values.

We agreed to raise the claims values in order to get consensus even though the claims values in S. 1125 as reported

represented a bipartisan proposal, and included some of the highest values found in similar Federal compensation programs. We raised the values even though S. 1125 already puts more money into the pockets of claimants than the current tort system, where more than half of the resources go into the pockets of attorneys and consultants. Under the revised bill, S. 2290, approximately \$111.5 billion of the expected \$114 billion in fund expenditures will be available for victims. Compare this with Tillinghast's actuarial study of the current system, where only \$61 billion goes to plaintiffs and the rest to legal fees. Or the Milliman study, where they estimate as much as \$92 billion could go to plaintiffs and the rest to legal fees. So the bill gets more money to victims than the leading studies estimate could go to them under the current system.

What's more, S. 2290 actually gets this money to sick victims, whereas much of the money paid into the system today goes to unimpaired claimants. Under the current system, much of the compensation is drained away from the truly ill to fund these unimpaired mass lawsuits. Right now, the sickest victims, those with mesothelioma, are receiving only 17 to 20 percent of the funds in the system, with nonmalignant cases getting about 65 percent. The proposed bill would prioritize the sickest victims—over half of the funding would be directed to those with mesothelioma. Nonmalignant claimants would receive about 20 percent. The new system would also increase the share of funds that are directed to pay cancer claims from about 16 or 18 percent to 24 percent. Under S. 2290, funds are properly directed at the sickest victims. And the determination of the medical criteria that should be used is a result of the landmark bipartisan agreement made in Committee.

S. 1125 also presents a substantially better means of obtaining compensation than through bankruptcy trusts. The trusts being created in bankruptcies today discriminate between present and future claims, and give preferential treatment to certain claimants, not because of their medical condition, but because they were first in line. Let me also point out that S. 1125 provides significantly more money than claimants could receive from bankruptcy trusts, many of which are paying pennies on the dollar. Johns-Manville pays 5 cents on the dollar, UNR 9 cents, Celotex 11.3 cents, and topping out at 15.5 cents is Eagle Picher. So while some claimants may appear to win big court cases, if the defendants are in bankruptcy, which many are, claimants will likely only get pennies on the dollar. In today's bankruptcy compensation system, the risk that a trust may be inadequate falls on the victims, and that is not fair. Unlike these bankruptcy funds, the claims values in S. 1125 will be 100 percent paid or victims will be able to return to the tort system.

Despite these generous values in the bill as reported, organized labor and Democrats urged that the values were not high enough. So we have agreed to raise the values because it is so important to create consensus and move this bill forward.

It is crucial that the fund has the faith and confidence of claimants, and that it can fulfill its mandate to compensate them. Funding must be adequate, it must be secure, and provisions must be made for any shortfall. And any risk must fall on defendants and insurers, not claimants.

To ensure funding adequacy, the bill establishes a new overall funding framework, which makes available \$114 billion for direct victim compensation. The funding provided is substantially more than what is estimated to reach victims if the current tort system is allowed to continue.

Let me say a few words about how this relates to the overall funding structure that came out of committee. The mandatory funding in the bill as reported was \$108 billion, which is similar to what S. 2290 offers. That funding proposal represented a very fair amount to solve the problem. The committee, however, went well beyond this benchmark during markup. The net effect of the committee modifications to S. 1125's financial structure was dramatic. S. 1125 as reported could have required businesses and insurers to provide compensation at up to two times the most credible estimates of total future plaintiffs' recoveries under the tort system. As a result, insurers almost uniformly withdrew their support for the act, calling it "dangerously unaffordable" and "potentially worse than the existing system."

In order to get the legislation back on track, I initiated a mediation process between insurers and defendant companies. We reached agreement whereby \$114 billion would be made available for victims. To help ensure this funding is obtained, enforcement provisions of the bill were further strengthened.

To address concerns that there will be early stress on funding, the revised schedule requires money from insurer participants to be infused in the first years, where it is expected that the highest demands will be placed on the Fund.

To protect against any shortfalls, an additional \$10 billion contingent funding is also available from defendants if necessary to pay claims in the out years of the fund's operation.

Furthermore, the bill gives the administrator more time and more flexibility to deal with a short term bulge in claims, if necessary. Under the bill as reported, the fund could have unnecessarily sunsetted due to a short term liquidity problem if a large number of claims were filed at once. Alternative sunset provisions have been provided, and the borrowing authority has been

expanded to increase the funds's liquidity. Sufficient funds will now be available to pay in full all claims found eligible before the fund sunsets, and any debt incurred by the fund will be paid by monies in the fund and not the United States Treasury.

Finally, and critically, under S. 2290 the risk of underestimating the amount of funds needed will not fall on the victims, but on the defendants and their insurers. Historically, rates of asbestos victims' claims filing are uncertain and difficult to predict. Given the creation of the new compensable disease categories in S. 1125 and the streamlined no-fault administrative system, this problem is even more acute. But under the proposal, if future claims exceed estimates and the mandatory funding, including the contingency funding, is not enough the fund will end and victims will be able to seek compensation in the Federal courts. Ensuring that the risk of underestimation does not fall on the claimants was a linchpin in organized labor's proposals.

There is, however, one particular risk to the fund that must be addressed, and that is the lack of predictability of claims by individuals, particularly smokers, who have occupational exposure, but not enough exposure to have caused asbestosis.

S. 1125 is careful to provide the highest levels of compensation to claimants whose illness has the greatest causal connection to asbestos. It is not and cannot be a tobacco compensation bill. With that said, the bill sets out within the consensus medical criteria a level VII category, a new and untested category for lung cancer cases, that may end up compensating large numbers of individuals whose illnesses are not caused by asbestos, but by smoking. There are experts who believe the eligibility criteria for this category will reliably screen for asbestos-caused lung cancers. But we just don't have enough experience with these claims. With 87 percent of overall lung cancer cases caused by smoking, they could inundate and sabotage the fund.

Accordingly, I want to put all Senators on notice that I intend to offer an amendment, after consultations with all interested parties, to provide a mechanism to protect the solvency of the fund if claims from level VII's dramatically exceed expected levels.

At its heart, today's proposal represents a policy choice. On the one hand, we have the status quo, with its delays, failure to compensate victims, bankruptcies, litigation costs, wasteful transaction spending, and major negative impact on the economy.

On the other hand, we have an opportunity to rationalize this broken system. It is true that there is some uncertainty in projecting future claims filing rates, but we are putting over \$100 billion into the system. And any risk that this is not enough would fall back on defendants. There would be a reversion to the Federal tort system,

and defendants would have to essentially pay twice—after staking over \$100 billion they would still be subject to tort claims. And claimants would get their day in court. This bargain is a reasonable policy choice.

Another fundamental way S. 1125 improves the current tort system is that it is more accessible and simpler for claimants to use. Organized labor, however, had expressed a concern that the administrative structure in S. 1125 as passed out of committee was too adversarial and cumbersome. This was a key concern for labor, so in order to address this concern, industry and labor representatives agreed under the auspices of Senator SPECTER and Judge Becker of the Third Circuit Court of Appeals, to simplify the process. I commend Senator SPECTER for this leadership in that process, and thank Judge Becker for his expertise and commitment.

Under the new proposal, claims processing will be moved from the Court of Federal Claims to an executive office situated in the Department of Labor. Now a single administrator will be responsible for both the claims handling and the management of the fund. The fund will benefit from the experience the Department of Labor has garnered from administering similar compensation programs over the past 90 years. The infrastructure already created under these programs will help with prompt program initiation.

The claims application process will now be more user friendly, there are fewer levels of administrative review, and the claimant assistance program will be expanded. The new structure provides for advisory committees with expertise on a host of issues to advise the administrator, and allows for contracting with entities who have knowledge and experience with asbestos-related injuries and compensation programs to assist in the processing of claims.

The new administrative structure also will help address concerns about how quickly funds will begin flowing to claimants—especially those with the most serious diseases, such as mesothelioma, who may only have a short time to live.

The new administrative structure will help to ensure that the program is up and running quickly and managed efficiently to the benefit of claimants, including providing for interim regulations and interim authority to begin processing claims as soon as possible. The interim administrator may prioritize claims so that the victims with the most severe injuries, especially mesothelioma victims, have their claims processed first. Money will flow into the system faster, since S. 1125 now requires upfront funding from participants. Money from defendants will be available within 3 months from the date of enactment from certain defendant participants and within 6 months from the remaining defendant participants, which will be in addition

to the monies received from the bankruptcy trusts. There also is authority to require upfront money from the insurer participants so that there is no delay in obtaining money from the insurers.

As an additional protection against an influx of early claims, the bill also provides the administrator with expanded borrowing authority to ensure that there are sufficient funds available to initiate the program and to pay claims in short order. The borrowing would be 100 percent collateralized against the mandatory payments from participants in the Fund.

These changes are designed to address concerns raised by Senator FEINSTEIN in the committee's consideration of the bill. Senator FEINSTEIN raised valid concerns that a delay in creation of the claims system would harm claimants. However, her amendment would have essentially left the current system in place for an indefinite amount of time and would allow credits for monies to be paid to the fund, having the unintended effect of perpetuating the status quo with its gross misallocation of payments to unimpaired claimants and its excessive attorney fees. Furthermore, it would have threatened the Fund itself, by diverting Fund assets to cover these unwarranted claims and fees.

Given the improvements that have been made to the claims processing system, good public policy demands expedited termination of the broken system and commencement of payments to the most worthy claimants, as defined by the consensus medical criteria.

Organized labor has an important role to play in protecting the interests of working people in the congressional debate. In addition to numerous concessions associated with the new administrative structure, representatives of organized labor aggressively advocated for a number of changes, which were adopted. These changes were aimed at ensuring that the program established under S. 1125 was the most fair to victims, as the intended beneficiaries of the program.

S. 2290 now provides for medical monitoring reimbursement for costs of physical examinations as well as costs for x-rays and pulmonary function testing.

S. 2290 explicitly extends the protections of HIPAA to ensure that claimants cannot be discriminated against for provision of health insurance solely as a result of filing a claim with the Fund.

This bill also requires the use of presumptions for satisfying the exposure criteria for certain industries, occupations, and time periods.

While I have outlined some major changes here, literally dozens of additional changes have been made to S. 1125 since the introduction of the bill. These changes clarify language and strengthen provisions to ensure that sick claimants are promptly and fairly

compensated, that the burden and risk on claimants is reduced to the extent possible, and that participants can obtain certainty with respect to their asbestos liabilities as necessary to promote the creation of jobs and the economy.

And it was recognized, as the bill was being considered by committee, that even as we are dealing with the aftermath of asbestos, the substance itself is still in limited use. The committee adopted Senator MURRAY's landmark asbestos ban, and this country's workers will be safer for it. It simply did not make sense to create a compensation system and continue to allow workers to be exposed.

We also addressed the terrible situation in Libby, MT, where many workers and residents have become ill from asbestos and the manufacturer, W.R. Grace has filed for bankruptcy leaving victims with little recourse. S. 1125 contains special provisions so that Libby victims can readily gain compensation from the Fund.

In addition, we must not forget this Nation's veterans. Veterans have been long overlooked when talking about the asbestos litigation crisis. Men and women who served in the Armed Forces were often exposed to significant amounts of asbestos while serving our country, particularly during World War II and while serving on ships. S. 1125 provides a better avenue, and may be the only avenue, for veterans to receive fair and prompt compensation, while still preserving the veterans' benefits that are currently available.

We have set forth a rational system, offering a positive alternative to today's broken system. It is one of the largest, boldest compensation programs in this Nation's history. The choice here is not about the mechanics of the program, the final dollar amount, or any individual provision. We can work those things out. The choice is whether to offer victims a better system than we have today, and at the same time rationalize the system to stop the havoc it is causing to jobs and the economy.

Indeed, we have made major progress in getting this bill ready for the floor, especially considering the controversial issues involved. We've had literally dozens of stakeholder meetings. During this process, all of the issues have been visited and revisited. All parties have been heard, and all concerns have been heard. While such a sweeping bill will inevitably contain compromises that are not perfect in the eyes of each stakeholder, we have listened to all concerns and come up with the best solutions possible.

I had hoped to bring the bill up for a vote before the last session ended. At that time, a lot of stakeholders felt that was premature. On November 22 of last year, I announced that I would wait, but that the bill would be considered by the end of March. Again on February 27 I made it clear that the bill would be brought up by the end of

March. To continue the discussions among the stakeholders, I again extended this time to the week of April 19, and, thus, we are here. It is time to stop talking and bring these issues to resolution.

We have waited long enough and worked to create consensus, and now we have significant support to wrap up the outstanding issues—challenging as they are—and hold a vote. There have been suggestions almost from the start that we need more time to come up with better answers. We have very few legislative days remaining, and as we feared, we are nearly out of time. Senator HATCH and I have consistently offered realistic scheduling and frankly have allowed too much delay already. Now we have run the clock out and we must act.

Standing still is not an option, as the situation continues to deteriorate. Victims wait for unpredictable and inequitable compensation, companies continue to declare bankruptcy, and jobs and the economy suffer.

For many Members, it will require courage and leadership to change the status quo, but I am calling on this body to give the American people a better system for compensating asbestos claimants. Inaction—allowing the status quo—is in itself a choice that harms victims and American workers.

I believe it is time to move forward by offering the changes I have described here in an amendment in the nature of a substitute.

Mr. President, I ask unanimous consent that a detailed summary of the major changes in a section-by-section description be printed in the RECORD following my remarks.

The PRESIDING OFFICER (Mr. SMITH). Without objection, it is so ordered.

(See exhibit 1.)

Mr. FRIST. Mr. President, there will no doubt be constructive proposals from Senators on both sides of the aisle to refine and improve this bill. That is what the amendment process is all about.

I encourage this process. It is my hope the process will be constructive and it will result in a bill that can pass this body. I look forward to the debate and consideration of S. 1125.

I yield the floor.

EXHIBIT 1

S. 2290—SUMMARY OF CHANGES FROM S. 1125 AS REPORTED

S. 1125, the Fairness in Asbestos Injury Resolution Act, as reported out of the Senate Judiciary Committee, represents an unprecedented advance on complex and difficult issues that have stalled previous attempts at similar legislation. Landmark agreements were reached on asbestos injury compensation issues such as medical criteria, and over 50 consensus-building changes were adopted overall. Nonetheless, a number of issues were left open for further discussion, and additional concerns were raised that were not addressed by the Committee. Since the bill was reported out of Committee, various stakeholders and members from both parties have continued negotia-

tions. The substitute bill being introduced reflects agreements on some of these difficult issues reached during these negotiations, and attempts to address a number of concerns that have been raised but have not yet been subject of agreement. In particular, the First/Hatch bill: raises claims values, creates a more streamlined administrative system that can be up and running quickly, provides increased liquidity and upfront funding so that claims can be paid in short order, and places the risk that the Fund runs out of money on the defendants and insurers and not on the claimants. These are just some highlights of the numerous changes that were made to make a fairer system for claimants. The following provides a section-by-section summary of the changes in the First/Hatch bill from S. 1125 as reported with explanations as to the need for the changes.

SEC. 3. DEFINITIONS

Changes were made to various definitions under this section to conform with other amendments in the bill to provide clarifications.

Sec. 3(3) Definition of "asbestos claim." S. 1125 seeks to replace the current broken tort system with a streamlined, administrative system. S. 1125, therefore, must preempt and supersede all asbestos claims filed in the current tort system. Concerns were raised that the definition of "asbestos claim" in S. 1125 as reported may have been interpreted as unduly limited, failing to cover some types of asbestos claims that are currently overburdening the tort system today, which were intended to be preempted and superseded by the Act. This definition was amended to help ensure that the definition is interpreted broadly to encompass all types of claims that are being filed in the system today. This definition has also been amended to make clear that claims alleging damage to tangible property are left intact.

[Sec. 3(6) Definition of "collateral source compensation." The disease categories under S. 1125 are not easily translatable from those filed in the tort system. The definition of "collateral source compensation," therefore, was clarified to more clearly encompass awards in the tort system.]

Sec. 3(9) Definition of "insurance receivership proceeding." A new definition for "insurance receivership proceedings" was added to S. 1125. This definition accompanies changes made to section 402 that would give the Fund a priority for collection of assessments from insurers in state insurance receivership proceedings. These provisions track those provided for insolvent companies in bankruptcy. This definition describes the state law proceedings to which the priority applies. This, like the bankruptcy provisions, help to ensure that the payments made to the Fund are continued despite any subsequent insolvencies of insurer participants.

[Sec. 3(11) Definition of "participant." One of the exceptions to "participant," defined in section 3(11), are companies who have completed their bankruptcy proceedings. This exception was amended to ensure that the bill is in concert with the United States Bankruptcy Code. A company is not "out of bankruptcy" until the plan of reorganization becomes effective in accordance with its terms. Under the Bankruptcy Code, changes to the plan can occur until the date on which the plan is "substantially consummated," as defined in section 1101(2) of that Code. Conforming changes were made to applicable sections in the funding provisions under title II.]

TITLE I—ASBESTOS CLAIMS RESOLUTION Subtitle A—Office of Asbestos Disease Compensation

The Frist/Hatch bill incorporates a new administrative structure for the processing and

paying of claims, which was part of an agreement between representatives of labor and industry groups negotiated under the auspices of Senator Specter and Judge Becker. This new structure responds to concerns raised by representatives of organized labor, who wanted a more streamlined and more non-adversarial system than that in S. 1125 as reported. Various aspects of the new structure promote the efficient management of the program and create a less burdensome system for claimants. Old title I, subtitle A, which created a claims processing structure within the Court of Federal Claims, was replaced with new subtitle A, which creates an executive office situated in the Department of Labor to administer the program. Subtitle B in S. 1125 as reported, which outlined the claims handling process, also was substantially amended to respond to requests by stakeholders. The new administrative structure also contains provisions to ensure that the program is processing claims as soon as possible, which were added as part of the alternative to the Feinstein startup amendment. Conforming changes were made throughout the bill.

Sec. 101. Establishment of Office of Asbestos Disease Compensation Program. New section 101 establishes within the Department of Labor, an Office of Asbestos Disease Compensation. This section clarifies that all administrative expenses of the program are to be paid from the Fund. The office is headed by an Administrator, who will be responsible for both the claims handling and the management of the Fund. The Administrator is appointed by the President with the advice and consent of the Senate, and reports directly to the Assistant Secretary of Labor for the Employment Standards Administration. The general duties of the Administrator are provided in this section, and provisions regarding the Administrator's fund management duties found in section 222 of S. 1125 as reported (p. 168-69) were incorporated into this general authority provision. Civil penalties up to \$10,000 for false statements and fraudulent acts against the Office are also provided for under this section. Two Deputy Administrators will be selected by the Administrator—one to carry out the Administrator's claims processing responsibilities, and one to carry out the Administrator's Fund management responsibilities. Finally, a general provision with respect to the application of the Freedom of Information Act ("FOIA") was added to section 101.

Placing the office within the Department of Labor was requested by labor representatives. In addition, much of the provisions in the Frist/Hatch bill are based on provisions from statutes and implementing regulations for compensation programs administered by the Department of Labor. The Administrator, therefore, can utilize the 90 years of experience the Department has in administering similar compensation programs and the infrastructure already created for these programs.

Sec. 102. Advisory Committee on Asbestos Disease Compensation. New section 102 provides for the establishment of an Advisory Committee on Asbestos Disease Compensation within 120 days after the date of enactment of the Act. The Advisory Committee will advise the Administrator on general policy and administration matters. The Advisory Committee is composed of 24 members with 3-year staggered terms. Sixteen members are to represent the interests of the claimants (at least 4 of which are recommended by recognized labor federations), defendant participants, and insurer participants. The remaining 8 members are appointed by the Administrator and cannot have earned more than 25% of their income for each of the 5 years prior to their appoint-

ment by serving in asbestos litigation as consultants or expert witnesses. The Administrator selects a Chairperson and Vice Chairperson. The Advisory Committee must meet at least 4 times a year for the first 5 years of the program and at least twice a year thereafter. The Administrator must provide information and administrative support as may be necessary and appropriate for the Advisory Committee to carry out its functions. The members are entitled to travel and meal expenses. An advisory committee was provided for under the Energy Employees Occupational Illness Compensation Program Act ("EEOICPA"), 42 U.S.C. §7384o, which served as a model to the new administrative structure. The size and scope of the Advisory Committee was outlined by labor representatives in order to provide stakeholders with the opportunity to provide the Administrator with input on the compensation program.

Sec. 103. Medical Advisory Committee. New section 103 is permissive rather than mandatory, granting the Administrator the authority to create a Medical Advisory Committee to provide general medical advice relating to the review of claims that cannot be adequately addressed by the larger Advisory Committee on Asbestos Disease Compensation. To help ensure objectivity on the part of the members of this Committee, individuals who earned more than 25% of their income for each of the 5 years prior to their appointment by serving in asbestos litigation as consultants or expert witnesses cannot be appointed to the Committee.

Sec. 104. Claimant Assistance. New section 104 expands the claimant assistance program under section 116 of S. 1125 as reported (p. 39). At the request of labor representatives, the program was expanded to include, among other things, the requirement to establish resource centers and to contract with labor and community based organizations. Aspects of this more expansive program are modeled on Section 7384v of the EEOICPA, for which several resource centers have already been established by the Department of Labor.

The streamlined administrative structure and the claimant assistance program, which includes assistance in finding pro bono legal representation, both reduce the burden on the claimant seeking compensation and the need for a lawyer. Although legal representation is allowed, the goal of S. 1125 is to reduce the high transaction costs of the current tort system, which can be upwards of 40% for legal fees to the plaintiff's attorney alone. As such, the Frist/Hatch bill provides for reasonable limits on attorneys fees to reflect this streamlined process, allowing for higher percentages for more complex cases. Penalties are provided for to ensure that these limits are followed.

Sec. 105. Physicians Panels. The Physicians Panels were established in order to perform the functions of the Medical Advisory Committee originally contemplated under S. 1125 as reported, section 114(j) (p. 37). The Physicians Panels will provide necessary medical advice in the adjudication of individual claims, as opposed to the newly created Medical Advisory Committee which would advise on general medical policy. While the Administrator still chooses how many panels are required, the statute now requires that each panel be composed of 3 physicians. The third physician is only to be consulted in the event the other two physicians cannot agree. The qualification that physicians serving on the panels be actively practicing was replaced by a limitation that such physicians cannot have earned more than 25% of their income for each of the 5 years prior to their appointment as an employee of a participant or a law firm representing any party in asbestos litigation or

as a consultant or expert witness in matters related to asbestos litigation. The previous qualification was deleted in order to allow doctors who are retired but have knowledge and experience with diagnosing asbestos-related illnesses may serve on the Physicians Panels. It was replaced by a requirement that sought to ensure objective doctors were placed on these panels. Labor representatives also requested less restrictive compensation provisions due to its impression that it is currently difficult to retain qualified doctors under the EEOICPA because of a limitation on compensation. A provision ensuring that Physicians Panels are exempted from the Federal Advisory Committee Act was also included at the request of labor representatives.

Sec. 106. Program Initiation. New section 106 was inserted in order to address concerns raised by labor representatives that the program could take an inordinate amount of time to start paying claims. This section requires the establishment of interim regulations, including regulations for the processing of exigent claims, within 90 days from the date of enactment in order to allow for an expeditious program startup, addressing concerns raised that victims do not have time to wait through undue delays until a whole new administrative program is established. The Secretary of Labor is required to provide the Administrator with temporary personnel and other resources as necessary to facilitate the initiation of the program. This section also defines "exigent health claims" as those made by individuals who are living mesothelioma claimants and others who have been diagnosed as terminally ill from an asbestos-related illness and having a life expectancy of less than one year. The Administrator has the discretion to identify additional exigent health claims as well as extreme financial hardship claims to be handled on an expedited basis.

Stakeholders recognized that an interim administrator may be appointed in the event that the Administrator is a presidential appointee to avoid any delays related to the Presidential appointment and Senate confirmation of an Administrator. To address this issue, the Frist/Hatch bill provides that the Assistant Secretary of Labor for the Employment Standards Administration serve as Interim Administrator, until the Administrator is appointed. The Interim Administrator may begin processing and awarding claims without regard to the time limits set forth in the title I, subtitle B. The Interim Administrator also may prioritize claims processing based on severity and causation, so that living mesothelioma victims or terminally ill claimants, who may not have much time, can be placed first in line and be paid as quickly as possible. The provisions, along with placing the Office within the Department of Labor, help to ensure that the program can be up and running in short order and effectively administered in the long run.

Sec. 107. Authority of the Administrator. New section 107 was added to provide the Administrator with general authority to issue subpoenas and conduct hearings, and is derived from the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §8126. Such authority is necessary to implement the Administrator's responsibilities under the Act.

Subtitle B—Asbestos Disease Compensation Procedures

Subtitle B lays out the claims handling process. Although it incorporates many of the same provisions found in title I, subtitle B, of S. 1125 as reported, new subtitle B represents the more streamlined process requested by labor representatives and includes changes which labor felt would create a fairer process for claimants.

Sec. 111. Essential Elements of Eligible Claim. Section 111 amends old section 113 from S. 1125 as reported (p. 28) as requested by labor representatives, by collapsing the requirements that were listed separately into a general reference to the "medical criteria" section in subtitle C, which includes latency, exposure, diagnostic and medical criteria requirements.

Sec. 112. General Rule Concerning No-Fault Compensation. No change from old section 112 in S. 1125 as reported (p. 28).

Sec. 113. Filing of Claims. New section 113 revises section 111 from S. 1125 as reported (p. 23). Section 113(a)(1) incorporates the definition of "personal representative" as the term is defined in 28 C.F.R. §104.4, which contains the regulations governing the September 11th Victim Compensation Fund of 2001. This change was made to avoid some of the difficulties that may be encountered in defining who may file on behalf of a deceased claimant and sorting through potential familial disputes. Also at the request of labor representatives, new provisions defining the "date of filing" and clarifying the procedures for handling incomplete claims were added. These provisions were based on the Radiation Exposure Compensation Act, 42 U.S.C. §2210 note, section 6(d), and regulations implementing the EEOICPA, 20 C.F.R. §30.100(c), and the Black Lung Act, 20 C.F.R. §§725.404(d), 725.409.

Statute of Limitations. Labor representatives raised a concern with respect to the statute of limitations section in S. 1125 as reported, which would allow setoffs in multiple injury cases of recoveries for all prior claims made with the Fund (section 111(c)(3), p. 27). New section 113(b) clarifies that a claimant who files a second injury claim with the Fund for a subsequently diagnosed malignant disease does not receive a setoff for prior recoveries from the Fund in cases where the claimant has already filed and resolved a claim with the Fund for a nonmalignant injury. This new provision is based on the 2002 Trust Distribution Procedures for the Manville Trust, which recognizes that claimants who develop and receive awards for a nonmalignant claim should not receive setoffs in the event that claimant is subsequently diagnosed with a malignant disease.

Another change was made to the statute of limitations for pending claims. Although S. 1125 creates a specific statute of limitations for "pending claims" timely filed in the courts or with a bankruptcy trust, S. 1125 does not seek to revive stale claims. As such, a definition of "pending claims" with bankruptcy trust was added to clarify when such a claim is "pending" for purposes of the statute of limitations. The new definition provides that only claims that have not yet been resolved with the trust be allowed to take advantage of the relaxed statute of limitations, and that claims will not be considered pending simply because they are awaiting additional payment installments or may have the potential to have increased payment.

Required Information. Additional changes were made to the required information provision of S. 1125 to reflect concerns raised by labor representatives that the application requirements were too strict, and to clarify certain required information at the request of labor representatives.

Sec. 114. Eligibility Determinations and Claims Awards. New section 114 replaces the claims handling provisions of S. 1125 as reported, including the administrative appeals process, largely in response to requests by labor representatives. It establishes a more streamlined system, eliminating at least one level of review from S. 1125; thereby resulting in the deletion of subtitle E of title I (En Banc Review) in S. 1125 as reported. Sub-

section (a) authorizes the Administrator to render decisions on claims for compensation. This language is based on provisions found in FECA, 5 U.S.C. §8124. Subsection (a) also clarifies that costs associated with any additional medical evidence or testing requested by the Administrator as part of the individual's claim shall be borne by the Fund.

Proposed and Final Decisions. The Administrator is required to issue a proposed decision, containing findings of fact and conclusions of law as well as an explanation of the procedures for review, within [90] days of the filing of a complete claim. The claimant then has the opportunity to request, in writing within [90] days of issuance of the proposed decision, an informal hearing or review of the written record. If a hearing is requested, it is to be conducted before a representative of the Administrator, and claimants have the right to request a subpoena, which may be granted or denied at the sole discretion of the representative hearing the claim. If no review has been requested, the Administrator issues a final decision. If the final decision in such cases materially differs from the proposed decision, the claimant may then seek review. If review of the proposed decision is requested, the Administrator is required to issue a final decision within [180] days after the request for a hearing, and [90] days after the request for review on the written record. A claimant may authorize an attorney or other individual to represent him or her in any proceeding under this Act. The provisions in new section 114 are largely based on FECA and its regulations and on regulations implementing the EEOICPA.

Sec. 115. Medical Evidence Auditing Procedures. New section 115 consolidates various program-wide and individual claims auditing provisions found in S. 1125 (sections 115(a), (b), p. 38, sections 114(c)(3)(B)(i), (c)(4), p. 31-32), with some modifications. The general auditing authority was clarified to require the development of methods for auditing and evaluating medical evidence and other types of evidence submitted to the Office (new section 115(a)(1)).

Independent Certified B-Readers. The provisions providing for review of x-rays by independent certified B-readers was amended to allow the Administrator to consider the findings of the independent certified B-readers rather than denying the claim in the event the independent B-readers disagree with the reading submitted by the claimant as was previously provided. This change was made to account for potential disagreements between the independent certified B-readers (new section 115(b)(3)). The purpose of this review, however, is still to ensure that questionable x-ray readings submitted by claimants are not considered when determining eligibility.

Smoking Assessment. Provisions on the assessment of claimant representations as to their smoking status was amended to clarify that such review applies only to other cancer claims, lung cancer claims, and exceptional medical claims. Based on past experience of claims filing, this section also now provides that the review of claims on smoking status should address at least 5 percent of the claimants asserting status as nonsmokers or ex-smokers because of the potential for fraud in such cases.

Subtitle C—Medical Criteria

In order to preserve the bipartisan agreement reached with respect to medical criteria, no changes have been made to this subtitle except where necessary to conform to the revised administrative structure under title I. One substantive change that was made as part of the agreement between labor and industry representatives on the ad-

ministrative structure was to add a requirement that the Administrator develop presumptions for satisfying the exposure criteria for certain industries, occupations, and time periods. A similar provision was included in S. 1125 as introduced, but was dropped from the medical criteria in S. 1125 as reported.

Subtitle D—Awards

Several major changes were made to Subtitle D (p. 81) of title I in S. 1125 as reported. [First, section 131(b)(1) adjusts the claims values to reflect those proposed by the Majority Leader (and to correct one apparent typographical error for nonsmoker, Level VIII claims). This bill raises claims values above S. 1125 in several categories.] Second, section 132(b) now provides medical monitoring reimbursement for costs of physical examinations by the claimant's physician as well as costs for x-rays and pulmonary function testing. A physical examination is another important element for obtaining a proper diagnosis, and should also be covered by the fund. Finally, although providing for payments over a three-year period was provided for in Committee at the request of labor and democrats, it was further clarified, also at the request of labor and democrats, that such payments should be made in the following amounts: 40% the first year, 30% the second year, and 30% the third year. The statute now provides a standard by which the Administrator must comply to extend such payments to 4 years—that is, if warranted in order to preserve the overall solvency of the Fund.

TITLE II—ASBESTOS INJURY CLAIMS RESOLUTION FUND

Subtitle A—Asbestos Defendants Funding Allocation

In addition to technical amendments, Subtitle A was amended to reflect the new funding allocation to defendant participants proposed by the Majority Leader, to provide a structure that would guarantee the \$2.5 billion (net of hardship and inequity adjustments) in defendant participant annual contributions, and to incorporate a funding proposal that would infuse the Fund with monies within months of enactment.

Aggregate Payment Obligations Level. As part of the Majority Leader's funding proposal, section 202(a) now provides that the defendant participants be required to pay \$57.5 billion to the Fund, subject only to a contingent call for additional payments. Section 204(h) requires annual aggregate payments to the Fund of \$2.5 billion a year for 23 years or until such time as the requirement in section 202(a) is reached (if it is reached in less than 23 years). In the event there are insufficient monies collected from defendant participants to reach this annual requirement (net of any hardship and inequity adjustments) in any given year, the Administrator is granted the authority to obtain the balance from a guaranteed payment account established pursuant to section 204(k). If there are insufficient funds in the guaranteed payment account to raise the balance required, the Administrator is granted the authority to impose a guaranteed payment surcharge under section 204(l) on all defendant participants, on a pro-rata basis in accordance with the liabilities under sections 202 and 203, as necessary to raise this minimum aggregate payment obligation (net of hardship and inequity adjustments) in any one year.

Financial hardship and Inequity Adjustments. Unlike S. 1125 as reported, the defendant funding formula now guarantees that funding will be available for hardship and inequity adjustments up to the annual limit of \$250 million. Section 204(d) was clarified to

ensure that adjustments in effect in any one year made for both financial hardship and inequity are subject to a combined \$250 million cap. Although limits based on a fixed percentage roughly equating to \$150 million for severe financial hardship and \$100 million for demonstrated inequity were originally provided, the Administrator is now given the discretion to use the \$250 million for demonstrated inequity adjustments and for financial hardship adjustments as deemed necessary. It is anticipated that the severe financial hardship adjustments will increase in importance in the future as companies become confronted with unanticipated and unpredictable financial hardships. The Administrator's discretion would be broad enough to allow the Administrator to reallocate monies from inequity adjustments to accommodate future financial hardships. [In addition, unlike S. 1125 as reported, such adjustment determinations would be subject to review.]

A financial hardship and inequity adjustment account under section 204(j) replaces the orphan share reserve account in S. 1125 as reported (section 223(h), p. 189). Under section 204(k), any excess monies above the \$2.5 billion minimum aggregate annual payments are to be placed into the financial hardship and inequity adjustment account up to \$250 million in any given year. Any monies not used in the account in any given year are carried over for use in the next year. Any additional excess funds (after the \$250 million) go to the guaranteed payment account established under section 204(k) to be used to ensure that the defendant participants reach the minimum annual aggregate payment amount (net of hardship and inequity adjustments) in future years. The monies in the financial hardship and inequity adjustment account are now to be used only to the extent the Administrator grants a financial hardship or inequity adjustment, and not in the event a defendant participant files for bankruptcy and cannot meet its obligations as previously provided in S. 1125 as reported. The guaranteed payment account provided for under section 204(k) (plus the potential surcharge) is meant to address any potential shortfalls due to such bankruptcies.

Contingent Call. Pursuant to the new Frist funding proposal, only defendant participants are subject to a contingent call for additional payments and, therefore, the contingent call provisions in S. 1125 as reported (section 223(f), p. 179-87) were moved to subtitle A of title II and amended to reflect the new Frist funding formula. Due to the increased liquidity provided for under the Frist funding proposal, the back-end payments provisions (section 223(g), p. 187-89) were deleted. The amended contingent call provision, section 204(m), grants the Administrator the authority to require up to \$10 billion in additional payments to be allocated based on the defendant allocation scheme in sections 202 and 203. To invoke the contingent call authority, the Administrator must certify, after consultation with appropriate experts, that such monies are required to meet the Fund's obligations. Although the Administrator may invoke the contingent call authority at any time for purposes of borrowing monies, the additional payments may not be assessed against defendant participants until after the total aggregate payment amount has been reached.

Upfront funding. Subtitle A also reflects changes that would require defendant participants to provide upfront funding to infuse the Fund with monies to begin paying claims within months of enactment. Section 204(i) requires a defendant participant to make a good faith determination as to its prior asbestos expenditures and/or payments made to pay claims brought under the Fed-

eral Employees Liability Act ("FELA"), and submit payments to the Administrator within 90 days of the date of enactment for Tiers I and VII and within 180 days of the date of enactment for Tiers II through VI. It is believed that 90 days is sufficient time for debtors and Tier VII defendant participants to determine their liability under this section and make initial payments. Due to the greater complexity of determining prior asbestos expenditures for Tiers II through VI, however, 180 days is allowed for defendant participants to be able to make an initial, good-faith determination and payment, conforming to the 6 month requirement for bankruptcy trusts to assign their assets to the Fund. The Administrator would still make a final determination as to a defendant participant's tier and subtier, and request additional payment or rebate for year 1 if necessary. After the initial payment, defendant participants must then make payments and submit information as prescribed by the Administrator. The right to an administrative rehearing was also clarified, and the statute now expressly requires the exhaustion of such administrative remedies prior to seeking judicial review.

Clarifications for Debtors. The superseding provisions related to debtors under section 202(e) were clarified to ensure that a plan of reorganization or other agreement associated with asbestos claims are superseded.

Subtitle B—Asbestos Insurers Commission

Subtitle B in S. 1125 as reported has been amended to reflect the new Frist funding proposal and to address potential constitutional problems that were inherent in Subtitle B of S. 1125 as reported. [Additional changes to further clarify these provisions may be necessary.]

Establishment of Asbestos Insurers Commission. Given the authority granted to the Commission, the appointment provisions in S. 1125 as reported allowing for Presidential appointment of the members after mere consultation with certain members of Congress, present potential appointments clause problems. Section 211, therefore, now provides that the members of the Commission are appointed by the President with the advice and consent of the Senate. In addition, Section 211 now provides that the Commission may act based on the participation of a majority of the members. S. 1125 as reported had required all the members be present for the Commission to be able to act, which was not practical and could have resulted in unnecessary delays in the allocation process.

Aggregate Payment Obligation Levels. As part of the Majority Leader's funding proposal, section 212(a)(2) provides that the insurer participants be required to pay \$46.025 billion to the Fund, and section 212(a)(3) outlines the annual aggregate payments. Insurer participant payments are front loaded, but are to be paid over a period of 27 years. Additional conforming changes were made to reflect the new funding provisions and to clarify the allocation process and criteria.

Upfront Funding. Similar to the defendant participants, the insurer participants are now required to provide upfront funding to help infuse the Fund with monies to begin paying claims quickly. Sec. 212(e) grants the Administrator the authority to require insurer participants to pay interim contributions to the Fund to assure adequate funding by insurer participants during the period between the date of enactment of the Act and the date when the Commission issues its final determination of contributions. Contributions required by the Administrator will be credited to the insurer participants subsequent payment obligations established by the Commission.

Guaranteed Payment. [To be determined.]

Subtitle C—Asbestos Injury Claims Resolution Fund

As described above, various provisions were moved to other parts of the bill and deleted from subtitle C in S. 1125 as reported. In addition to provisions previously identified, the provisions relating to violations of environmental and occupational health and safety requirements (section 222(c), p. 171) were moved to Title IV—Miscellaneous Provisions. Various substantive changes, as well as other conforming changes and technical corrections, were made to this subtitle to help increase the Fund's liquidity and to help protect the integrity of the Fund.

Borrowing Authority. As part of the Majority Leader's funding proposal, the borrowing authority provision of S. 1125 as reported (section 223(c), p. 177) was amended to provide more expansive authority to increase the Fund's liquidity. Under new section 223(b), the Administrator is now authorized to borrow against up to seven years of expected payments by the participants. The new borrowing provisions clarify that any debt incurred is to be paid solely by amounts available in the Fund. To help ensure that the fund is up and running quickly, monies may be borrowed from the Federal Financing Bank during the first two years of the Fund. The increased liquidity will also help to fix short-term funding problems in the event there is a bulge in claims to ensure that the Fund is not unnecessarily subject to an early sunset.

Increased Enforcement. Additional provisions were added to subtitle C to strengthen the Administrator's authority to enforce the participants' payment obligations. New audit authority has been provided for under section 223(d). This audit authority is for the following purposes: (a) ascertaining the correctness of any payments made to the Fund; (b) determining whether a person who has not made a payment to the Fund was required to do so; (c) determining the liability of any person for a payment to the Fund; (d) collecting any such liability; or (e) inquiring into any office connected with the administration of enforcement of title II. In addition to the criminal penalties already provided for in S. 1125 as reported, civil penalties for false statements and fraudulent acts against the Administrator have been added under this section. The enforcement provisions in section 225 now provide that the Administrator may enforce the provisions of this Act in proceedings outside of the United States to ensure the ability to go after recalcitrant foreign companies subject to the liabilities under the Act. Additional enforcement provisions aimed at insurer participants were also added to section 225. New section 226 provides that interest be paid on any amount of payment obligation that is not paid on or before the last date prescribed for payment.

TITLE III—JUDICIAL REVIEW

The judicial review provisions in S. 1125 were largely replaced to reflect changes in the administrative structure and to simplify the provisions. These changes were largely as a result of negotiations between representatives of labor and industry.

Sec. 301. Judicial Review of Rules and Regulations. Section 301 now applies to judicial challenges of rules and regulations promulgated by the Administrator or the Asbestos Insurers Commission pursuant to the Act, granting the United States Court of Appeals for the District of Columbia Circuit exclusive jurisdiction over such actions. Any petition for review must be filed within 60 days of the date the notice of such promulgation appears in the Federal Register.

Sec. 302. Judicial Review of Award Decisions. Section 302 now applies to judicial review of eligibility determinations made by

the Administrator. Any claimant adversely affected or aggrieved by a final decision of the Administrator awarding or denying compensation may petition for judicial review within [90] days of the issuance of a final decision of the Administrator. Such petition may only be filed in the United States Court of Appeals for the circuit in which the claimant resides at the time of the issuance of the final order. At the request of labor representatives, the standard of review of such eligibility determinations was changed from the usual arbitrary and capricious standard to a substantial evidence standard.

Sec. 303. Judicial Review of Participants' Assessments. Section 303 now applies to judicial challenges of participants' assessments made by the Administrator or the Asbestos Insurers Commission. The United States Court of Appeals for the District of Columbia Circuit, rather than the United States District Court for the District of Columbia as was provided in S. 1125 as reported, has exclusive jurisdiction over such actions. A petition for review must be filed within 60 days of the final determination giving rise to such action. Defendant participants must file a petition for review within 30 days of the Administrator's final determination (after rehearing), and insurer participants must file a petition for review within 30 days of receiving notice of a final determination.

Sec. 304. Other Judicial Challenges. Section 304 provides that any action challenging the constitutionality of any provision of the Act must be brought in the United States District Court for the District of Columbia. The provision also authorizes direct appeal to the Supreme Court on an expedited basis. An action under this section shall be filed within 60 days after the date of enactment or 60 days after the final action of the Administrator or the Commission giving rise to the action, whichever is later. The District Court and Supreme Court are required to expedite to the greatest possible extent the disposition of the action and appeal.

Sec. 305. In General. As provided in S. 1125 as reported, section 305 also states that no stays of payments into the Fund pending appeal are allowed. In addition, no judicial review other than as set forth in sections 301, 302 and 303 is allowed. Any decision of the federal court finding any part of the FAIR Act to be unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court within 30 days of such ruling.

TITLE IV—MISCELLANEOUS PROVISIONS

The following provisions in Title IV have been amended from S. 1125 as reported.

Sec. 402. Effect on Bankruptcy Laws. Various changes were made to section 402 for clarifications and to address possible constitutional arguments that may affect the ability of the Fund to receive assets from current bankruptcy trusts.

Sec. 403. Effect on Other Laws and Existing Claims.

Asbestos Claims Barred. Section 403(d)(2) is changed to address a variety of unconventional asbestos claims that plaintiffs have asserted directly against both defendant participants and insurer participants in the tort system.

Subsection (d)(6) is added to permit parties to obtain a credit in the event that a court ignores or misapplies the exclusive remedy provisions of the Act, and erroneously awards a judgment in favor of asbestos claimants outside of the federal compensation program.

Initiation of the Fund. Because the new administrative structure and the new funding provisions were amended to ensure that the program is up and running in a matter of months, section 403(d)(5) (p. 211) was deleted from the bill.

Sec. 404. Effect on Insurance and Reinsurance Contracts. Section 404 (Section 406 in the Committee Bill) deals with the effect of the Act on insurance and reinsurance contracts. Section 406 as it came out of Committee accounted for "erosion" of insurance policies that cover not only asbestos liabilities, but also potentially other liabilities. The section established how contributions to the fund by insurers and reinsurers would reduce the limits of existing insurance policies held by the defendant participants.

Erosion. Changes have been made in section 404(a), dealing with erosion of insurance coverage limits, in order to account for the possibility of an early sunset of the Fund. Based upon the assumption that insurers and reinsurers will be required to make payments into the Fund for 27 years after enactment, erosion of the policy limits is deemed to occur at enactment. If the Act sunsets early, however, the insurers may not be required to pay the full amount for which they have been given erosion credit. In order to treat this situation, section 404 has been amended to provide for the restoration of unearned erosion that exists at the time of an early sunset.

Additionally, section 404(a)(2)(B) has been amended to conform the Act to the revised funding structure. The Bill that passed out of Committee deemed certain erosion to occur upon a contingent call because the contingent funding was shared equally by the insurer participants and the defendant participants. Any required contingent funding is now to be required solely of defendants, and therefore no erosion will be deemed to occur upon contingent payments.

Finite Risk Policies Preserved. The Frist/Hatch bill includes a new section 404(d), dealing with finite risk policies. Finite risk policies are non-traditional insurance and reinsurance vehicles that have in recent years been obtained by a relatively small number of defendants in asbestos litigation and some of their insurers in an effort to responsibly manage their asbestos liabilities. These contractual arrangements were specifically designed because traditional asbestos coverage was no longer available after the mid-1980s. Generally, finite risk policies provide coverage with respect to events that occurred in the past and are already known to both parties to the contract. Commercial General Liability insurance provides coverage usually for injuries that may occur in the future.

Because of the unique nature of these kinds of contractual arrangements, it is appropriate that finite risk insurance be excluded from the legislation. This will avoid the danger that participants that have entered into these arrangements could be required to pay twice. Without the exclusion, participants that have entered into finite risk arrangements would be required to pay substantial amounts to the trust fund and also be subject to a potential forfeiture of their rights to funds comprised, in effect, mostly of their own money used to prepay their asbestos liabilities. The participants that have obtained finite risk insurance should not be penalized by the legislation. If the finite risk arrangements are not excluded from the legislation, the insurance carriers issuing the finite risk insurance policies would reap a substantial windfall at the expense of such participants.

Treatment of Other Insurance and Reinsurance Rights or Obligations. A new section 404(e) has been added to specify the effect of the Act on certain reinsurance and insurance claims. Generally, no participant may pursue coverage claims against another participant or captive insurer for required payments to the Fund. Certain insurance assignments are voided. Otherwise, the Act does not affect insurance or reinsurance rights or

obligations unless a person voluntarily pays a claim superseded by the Act or otherwise available limits are deemed eroded.

Sec. 405. Annual Report of the Administrator. The sunset provisions in S. 1125 as reported (section 404(3), p. 214) created an inflexible trigger that could cause the Fund to terminate unnecessarily because of a short-term bulge in claims to the detriment of claimants. Section 405 amends old section 404 to provide a workable alternative to the sunset provisions, giving the Administrator more time and more flexibility, such as through the increased borrowing authority, to deal with a short term aberration in claims and available funding. S. 1125 only gave the Administrator a mere 90 days to correct for short-term liquidity problems. S. 1125 as reported also would have only ensured that 95% of the award amounts owed for the prior year and 95% of eligible claimants be paid prior to sunset. The alternative now in the bill would require that sufficient funds be available to pay all resolved claims in full. Moreover, the bill now makes clear that any debt incurred by the Fund is paid by monies in the Fund and not the United States treasury. These provisions also ensure that the risk that the Fund runs out of money is borne by the participants, providing that, in the event of sunset, a federal cause of action is created and the claimants may file their claims in federal court.

Sec. 406. Rules of Construction Relating to Liability of the United States. This section was previously section 405 in S. 1125 as reported [with one change to conform to the new administrative structure].

Sec. 407. Rules of Construction. Provisions found in section 101(d) of S. 1125 as reported (p. 23) can now be found under new section 407.

Sec. 408. Violations of Environmental and Occupational Health and Safety Requirements. Provisions found in section 222(c) of S. 1125 as reported (p. 171) are now placed in new section 408.

[Sec. 409. Tax Treatment. Currently, insurers have tax-deductible status for reserves originally set aside for payment of asbestos claims. Under S. 1125, these reserves would now be used to pay assessments required by the Act. New section 409 would maintain the tax deductibility of these reserves until such time as the insurer makes payment to the Fund.]

Sec. 410. Nondiscrimination of Health Insurance. New section 410 incorporates a proposed amendment by labor representatives and Democrats that explicitly extends the protections of HIPAA to ensure that claimants cannot be discriminated against for provision of health insurance solely as a result of filing a claim for medical monitoring reimbursement with the Fund.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

RECOGNITION OF MINORITY LEADER

The PRESIDING OFFICER. The Democratic leader is recognized.

DEBATING ASBESTOS LITIGATIONS REFORM

Mr. DASCHLE. Mr. President, I will address a couple of issues. I am disappointed we have come to debate the asbestos issue under these circumstances. I agree with much of what